Petition

81-2049

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DELEON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government violates a defendant's right to due process or to compulsory process by deporting illegal alien witnesses after officials of the government have interviewed the witnesses and concluded that they can provide no evidence on behalf of the defendant different from that available from alien witnesses who are retained to testify at trial.

2. Whether, assuming that the deportation of illegal aliens violates the defendant's rights, dismissal of the indictment is the appropriate remedy when the defendant cannot demonstrate any prejudice caused by the absence of the witnesses.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-28a) is reported at 669 F.2d 1131. The oral opinion of the district court granting respondents' motions to dismiss their indictments (App. B, *infra*, 29a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 55a) was entered on February 5, 1982.[1] On March 30, 1982, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *.

STATEMENT

On August 13, 1980, respondent Armijo-Martinez was indicted in the United States District Court for the Western District of Michigan for transporting five illegal aliens within the United States, in violation of 8 U.S.C. 1324(a)(2), and his son, respondent Armijo-DeLeon, was indicted in the same court for transporting 13 illegal aliens, in violation of the

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[1] The United States moved in the court of appeals for an extension of time for filing a petition for rehearing until after this Court's decision in *United States* v. *Valenzuela-Bernal*, No. 81-450 (argued Apr. 20, 1982). On March 24, 1982, after the time for filing a petition for rehearing had expired, the motion for an extension of time was denied.

same statute. The district court granted respondents' motions to quash their indictments because the Government had allowed 14 of the 18 illegal aliens whom respondents had transported to leave the United States before defense counsel had an opportunity to interview them (App. C, *infra*, 51a-54a). On appeal from the dismissal of the four counts of the indictment relating to illegal aliens who had been detained as material witnesses, a divided panel of the Sixth Circuit affirmed.

1. Respondents, father and son, are lawful permanent resident aliens from Mexico. In late July and early August 1980, the Immigration and Naturalization Service (INS) suspected that the respondents were transporting illegal alien laborers to and from farms in the Pullman, Michigan area (App. A, *infra*, 2a). On the basis of information from two confidential informants, plus their own observations, INS agents obtained warrants authorizing a search of respondents' vehicles (*ibid.*).

In the early morning of August 6, 1980, a team of INS and Border Patrol agents set up a surveillance of respondents' residence. They observed respondent Armijo-DeLeon get into a Ford van, drive to a nearby farm labor camp, and pick up 13 Hispanic males in farm attire. The agents stopped the van, executed their warrant, and determined that all 13 passengers were illegal aliens (*ibid.*). Both the illegal aliens and Armijo-DeLeon were taken into custody. Meanwhile, respondent Armijo-Martinez was observed loading five Hispanic males into a second van. The agents also stopped this van, once again determined that all the passengers were illegal aliens, and took custody of the van's occupants, including Armijo-Martinez (*ibid.*).

Later that day, after receiving *Miranda* warnings in both Spanish and English (St. 2, 3, 13, 19, 32, 33),[2] both respondents gave signed, sworn statements to the INS agents. Respondent Armijo-DeLeon made a complete and detailed confession. In his confession, he stated (St. 4-5, 14):

> When I was arrested today there were 13 illegal aliens in my van. I knew that all 13 were from Mexico because they told me.
>
> * * * * *
>
> I know them to be illegally in the United States because I have seen them writing home to their wives in Mexico, sending money home regularly and so on. If anyone of them had legal papers for the United States I would have known it. This is not a thing that is kept secret. I have seen illegal aliens all my life and from this experience, I know the thirteen men in my van today were illegal aliens from Mexico.

Armijo-DeLeon also stated that he believed the thirteen aliens had been in the United States "for around one year more or less." (St. 6, 15). Armijo-DeLeon further stated that his father also knew that the men they were transporting were illegal aliens (St. 9, 17).

Armijo-Martinez, though more guarded than his son, likewise admitted that he knew the aliens appre-

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[2] "St." refers to the post-arrest statements of both respondents, which were included as an addendum to the Government's opening brief filed with the court of appeals in this case. Respondent Armijo-DeLeon's original statement was handwritten. In the addendum, a copy of his handwritten statement (St. 2-12) is followed by a typed version (St. 13-18). "C.A. App." denotes the Joint Appendix filed with the court of appeals.

hended in his van were illegally in the United States (St. 27, 29, 30). He also admitted that he helped arrange jobs for the aliens and handled their pay records (St. 28).

INS agents interviewed all 18 of the captured alien passengers. Each admitted that he was illegally in the United States. All were searched, and their possessions were gathered and inventoried. None of the aliens had, either on his person or among his possessions, any document indicating lawful status in this country (C.A. App. 117). On August 8, 1980, two days after their apprehension, 14 of the aliens were sent to Detroit, Michigan, where they were offered, and accepted, voluntary departure in lieu of deportation (8 U.S.C. 1252(b)). They were then taken to El Paso, Texas, and were released into Mexico by August 12, 1980 (C.A. App. 74-75).

Four of the illegal aliens, two from each van, were retained by the government as material witnesses. Like the others apprehended, all four admitted that they entered this country illegally, and that they had been here less than three years since their latest entry.[3]

3. Prior to trial, respondents moved to dismiss the indictment on the ground that the government violated their Fifth Amendment due process and Sixth

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[3] Three of the four were kept in jail for 43 days. The fourth alien was released on bond after a shorter period. In this regard, it is worth noting that respondents' counsel made no real effort to interview the detained witnesses quickly in order to reduce the time they might have to be detained (C.A. App. 106-107; 109-110). Indeed, counsel for respondent Armijo-Martinez has never spoken with any of them.

Perhaps of even greater interest is the fact that one of the aliens retained from the van of Armijo-Martinez was also one of the aliens Armijo-Martinez had been convicted of smuggling into this country in 1978.

Amendment compulsory process rights by allowing the 14 aliens to return to Mexico before respondents' counsel had an opportunity to interview them or subpoena them to testify on respondents' behalf. The district court heard oral argument on this motion. Counsel for respondent Armijo-DeLeon stated that his client told him that two aliens—who were among those still detained as witnesses—had displayed "green cards," indicating their lawful status. Counsel also stated that some of the absent aliens were in the room at the time and "could have " observed the alleged exhibition of green cards (C.A. App. 80). Counsel maintained that he had interviewed the two retained witnesses (C.A. App. 76), but did not say that they would testify to having shown green cards and did not say why their testimony would be insufficient to describe what documentation they had in fact displayed.

Counsel for respondent Armijo-Martinez made no claim that any aliens had shown his client documentation of lawful presence in this country. He did claim that one alien, named in Count Five of the indictment, had called his client and had arranged for a number of aliens to come to Pullman, Michigan, for work (C.A. App. 89). Counsel stated that he would like that witness present "to have him explain how these people got up here * * *," but did not explain how this testimony or any other would be useful to any defense (*ibid.*).

The district court granted respondents' motion to dismiss. No evidentiary hearing was held, and the district court made no findings of fact. The court simply rendered an oral opinion from the bench. The court found that the 14 illegal aliens were eyewitnesses to the events of August 6 (App. B, *infra*, 44a). In addition, some of them might have told

respondent Armijo-DeLeon that they were legally in the United States and that based on counsel's representation one other witness was "crucial" to respondent Armijo-Martinez's defense and therefore the aliens "could conceivably" aid both respondents' defenses (*id.* at 44a-47a). In these circumstances, the court held, the aliens' departure deprived respondents of their Fifth and Sixth Amendment rights, and dismissal of their indictments was required (*id.* at 49a).

4. A divided panel of the court of appeals affirmed the judgment of the district court (App. A, *infra*, 1a-28a). Relying primarily on *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and *United States* v. *Valenzuela-Bernal*, 647 F.2d 72 (9th Cir.), cert. granted, No. 81-450 (Nov. 2, 1981),[4] the court of appeals concluded that a defendant need show only a "conceivable benefit" that is lost by the absence of the illegal aliens in order to obtain dismissal of the indictment against him. The majority found it sufficient that counsel for respondents had "articulated the issues and identified the type of evidence" that could negate a finding of intent (App. A, *infra*, 15a, 21a). With regard to the proper remedy for this violation, the majority distinguished this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), on the theory that nothing short of dismissal of the indictment would suffice to remedy the damage done to respondents' right to obtain a fair trial (App. A, *infra*, 18a-19a).

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[4] The court of appeals also relied in particular on *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States* v. *Calzada*, 579 F.2d 1358 (7th Cir.); and *United States* v. *Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980).

Judge Kennedy dissented solely on the basis of *Morrison*. She pointed out that under the majority's reasoning *any* defendant could demonstrate "prejudice" sufficient to warrant dismissal of the indictment (App. A, *infra*, 24a). Judge Kennedy concluded that this was inconsistent with *Morrison's* requirement of a substantial likelihood of prejudice and therefore argued that the government should be afforded an opportunity "to show by a preponderance of the evidence that defendants were not prejudiced under the totality of the circumstances" (*id.* at 27a).

REASONS FOR GRANTING THE PETITION

This case presents important questions identical to those presented in *United States* v. *Valenzuela-Bernal*, cert. granted, No. 81-450 (Nov. 2, 1981), which is presently before the Court. Both cases concern the application of the Due Process and Compulsory Process Clauses to the situation where illegal aliens, who are present at the scene of a crime, are returned to their own country prior to being interviewed by defense counsel. Indeed, the majority in this case relied heavily upon the Ninth Circuit's decision in *Valenzuela-Bernal*; expressly adopting the "conceivable benefit" test from that decision (App. A, *infra*, 21a).[5] Obviously, the disposition of *Valenzuela-Bernal* by this Court will significantly affect the validity of the decision of the court of appeals in this case, and therefore we submit that this case should be held pending the disposition of *Valenzuela-Bernal*.

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[5] In our reply brief in *Valenzuela-Bernal*, No. 81-450, we criticize at some length the reasoning of the majority in this case (Br. at 13-15). A copy of our briefs in that case have been sent to respondents.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Valenzuela-Bernal*, No. 81-450, and disposed of as appears appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-1798

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DELEON, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Western District of Michigan

Decided and Filed February 5, 1982

Before: LIVELY and KENNEDY, Circuit Judges; and PECK, Senior Circuit Judge.

LIVELY, Circuit Judge, delivered the opinion of the Court in which PECK, Senior Circuit Judge, joined. KENNEDY, Circuit Judge filed a separate dissenting opinion.

LIVELY, Circuit Judge. This appeal concerns the compulsory process guarantee of the Sixth Amendment. The first question is whether the government may, by its unilateral action, make material witnesses in a criminal prosecution unavailable to the

defendant. We hold that such action by the government violates constitutional rights of the defendant. The second question is what showing must be made by a defendant who has suffered this constitutional deprivation in order to entitle him to judgment dismissing the charges against him. These issues have arisen frequently in other circuits in prosecutions for transporting or harboring illegal aliens. The Ninth and Fifth Circuits have dealt with them on a number of occasions, and the Seventh Circuit has done so in at least one.

I.

A.

The defendants Carlos Armijo-Martinez (hereafter Martinez) and his son, Carlos Armijo-DeLeon (hereafter DeLeon) were arrested by agents of the Immigration and Naturalization Service (INS) near Pullman, Michigan on August 6, 1980. The agents had procured a search warrant for vehicles driven by the defendants on the basis of information that they were engaged in transporting illegal aliens to and from work on farms in the vicinity of Pullman. Both defendants are citizens of Mexico who have permanent resident alien status in the United States and live in the Pullman area. On the morning of the arrests INS agents saw a number of men getting into two vans, which were then driven away from the loading point by the defendants. When the vans were stopped by the agents, the one being driven by DeLeon was found to contain 13 men and the one driven by Martinez containing five male passengers. All appeared to be Hispanic. Concluding that all the passengers were illegal immigrants, the INS agents placed the two defendants and the 18 occupants of the vans under arrest.

Later in the day of their arrest the defendants gave statements to the agents. DeLeon's statement was written out by an agent in longhand and signed by DeLeon. The statement of Martinez was in question and answer form. Both statements contained admissions that the defendants knew their passengers were illegal aliens, and DeLeon's statement added that he knew some of the aliens had been in the United States for about one year. The 18 occupants of the vehicles were also interviewed. All admitted that they were in the United States illegally. The 18 illegal aliens were searched and all their possessions were gathered up by the agents and inventoried. No documents were found on the person or among the possessions of any of the 18 which indicated that any of them were in the United States legally.

B.

On the day following the arrests a criminal investigator for the INS filed a complaint against each of the defendants. Both complaints listed four of the illegal aliens, two from each van, as material witnesses. On the same day, August 7, 1980, each defendant made an "initial appearance" before a magistrate who set appearance bonds. At this initial appearance each defendant requested that an attorney be appointed to represent him. The following day, August 8th, letters were sent to two attorneys notifying them that they had been appointed to represent defendants. It is undisputed that Norman Kravitz, appointed to represent DeLeon, received his notification of appointment on August 11th, and that Michael Sefton received notice on August 12, 1980 that he had been appointed to represent Martinez.

On August 7th the government also made motions in each case requesting the court to set a cash bond for each of the four illegal aliens named as material witnesses in the complaints and who were being detained. In accompanying affidavits the INS criminal investigator stated that unless safeguards were imposed to avoid flight of each of the material witnesses, "It would be impracticable to secure his presence by subpoena as he would be in a country outside the United States." Bond for each of the witnesses was set at $1,000 and the four aliens were then committed to the Kent County jail as material witnesses. One of the four posted a $1,000 bond and was released on August 20th. The other three remained in jail for 43 days until bond was reduced to $50. At least one of the four was missing at the time of the hearing in district court. On August 8th the remaining 14 illegal aliens were sent by the government to Detroit, where they were offered, and accepted, voluntary departure in lieu of deportation. The 14 were then taken at government expense to El Paso, Texas, reaching there on August 10th. By August 12, 1980 all 14 were in Mexico.

C.

On August 13, 1980 a federal grand jury indicted DeLeon on 13 counts of transporting an illegal alien within the United States in violation of 8 U.S.C. § 1324(a)(2),[1] and Martinez on five counts charging

[1] 8 U.S.C. § 1324(a)(2) (1976) provides:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds

the same offense. Each count referred to one of the 18 illegal aliens and charged a violation which consisted of transporting the named alien within the United States.

The defendants were arraigned on August 25th. On September 26th both defendants filed motions to require the government either to produce the 14 illegal aliens or dismiss the indictment. A hearing on these motions, which consisted of statements by opposing counsel, was held by the district court. The government conceded that none of the 14 illegal aliens had been available since their return to Mexico on August 12, 1980.

Mr. Kravitz, the attorney for DeLeon, said that his client had stated he did not believe any of the 13 occupants of his van were here illegally and that his 11 passengers who had returned to Mexico could corroborate his claim. Kravitz had been told by DeLeon that some of the unavailable witnesses had shown DeLeon identifying information such as social secu-

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to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

rity cards and immigration (green) cards which would support his claim that he did not know whether or not any were illegal aliens. Since all the aliens were staying together in a single room at DeLeon's residence, DeLeon felt that some of the missing witnesses should have seen others showing him such identification. The attorney was unable to substantiate his client's claims because he had had no opportunity to interview the aliens who had returned to Mexico. Mr. Kravitz argued that DeLeon's statement to the goverment agents was not a confession but at most an admission of some incriminating facts. He emphasized that the statement was written by the INS agent, not by DeLeon, and that DeLeon claimed many parts of it were not true.

Attorney Sefton, representing Martinez, stated that one of his passengers who had been permitted to return to Mexico had been the spokesman for the group and was the one who had contacted Martinez about finding work for them. The testimony of this witness was required to establish Martinez's claim that the five men had been working in a Chicago plant for a long time and had come to Michigan when the plant had closed. He also contended that the admissions in his client's statement did not constitute a confession.

The assistant United States attorney argued that the statements of the defendants, which the government considered to be confessions, were directly contrary to the claimed need for the witnesses, since both defendants admitted they knew the people they were transporting were illegal aliens. The government attorney pointed out that counsel for the defendants had taken no steps to depose the four detained witnesses because they wanted these witnesses to testify at the trial. Actually Kravitz had inter-

viewed three of the detained witnesses prior to the hearing. Arguing a theory of waiver, the prosecutor stated that interest of defense counsel in the 14 aliens who had returned to Mexico "heightened" only when they learned that the 14 were gone. The government attorney expressed her concern about the due process rights of persons who are detained for long periods as witnesses without being charged with an offense. At the conclusion of her statement the prosecutor admitted to the court that the government would be unable to produce any of the 14 for trial.

D.

The district court expressly found that the defendants had not waived their right to the testimony of the 14 missing witnesses. The court found that the witnesses became unavailable before defense counsel had an opportunity to interview them or attempt to delay their voluntary departure. Further, the defendants could not know what these persons might say about their cases because of the lack of opportunity for their lawyers to interview them. Since the 14 were eyewitnesses to the events which were the basis of the charge, they were material witnesses. Under these circumstances the district court found that the missing witnesses could conceivably benefit the defendants and that counsel had made at least the "slightest suggestion" that testimony of the 14 would be helpful to both defendants. The court found that the confessions were immaterial to his decision since the defendants could not be convicted on the basis of the confessions alone. Concluding that the Sixth Amendment right of the defendants to compulsory process had been denied by the unilateral act of the government, the district court granted the motions

and dismissed the indictments, and the government appealed.

II.

The district court stated that it was applying the rationale followed by the Ninth and Seventh Circuits which had decided similar cases. The Ninth Circuit was the first to speak. In *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (1971), a prosecution for transporting illegal aliens, three of six eyewitness aliens were returned to Mexico after being interviewed by INS agents. At a hearing on a motion to require the government to produce the three returned witnesses or to dismiss the indictment, the government conceded that it could not produce the witnesses. It was shown that defense counsel had no opportunity to interview the eyewitnesses before they were returned to Mexico. The district court denied the motion, and the defendant was convicted. The conviction was reversed on appeal because the government by its action had deprived the defendant of an opportunity to interview eyewitnesses to the event which was the basis of criminal charges against him and had put the witnesses beyond the reach of the court's subpoena power. The government's acts were found to violate the due process guarantee of the Fifth Amendment and the compulsory process guarantee of the Sixth Amendment.

In *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), the court was confronted with a similar set of facts. Out of 39 illegal aliens arrested in a raid, all but four were released to Mexico before the defendants or their attorneys had an opportunity to interview them. All of the 35 who were released had either been interviewed by government agents or had

testified before a grand jury before returning to Mexico. The remaining four were either paroled into the United States or kept in custody. In affirming the district court's dismissal of the indictments, the court stated:

> The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant. *Compare* United States v. Romero, 469 F.2d 1078 (9th Cir. 1972), *cert. denied* 410 U.S. 985, 93 S.Ct. 1512, 36 L.Ed.2d 182 (1973). The vice lies in the unfettered ability of the government to make the decision unilaterally. The Sixth Amendment guarantees a defendant the right to subpoena favorable witnesses. Washington v. Texas, 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Here, the government placed witnesses, who may have been favorable to the appellees, outside the power of our courts to require attendance. In *Mendez-Rodriguez* we held that this same act denied the accused due process because it interferred with his ability to defend himself from criminal charges. 450 F.2d at 4-5. A defendant has the right to formulate his defense uninhibited by governmental conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense.
>
> Having based our decision in *Mendez-Rodriguez* on the Fifth and Sixth Amendments, we must be careful not to make an artificial distinc-

> tion which in actuality fails to mandate a different constitutional result.

Id. at 423.

United States v. *Valenzuela-Bernal*, 647 F.2d 72 (9th Cir.), *cert. granted*, —— U.S. —— (50 U.S.L.W. 3334, Nov. 2, 1981), involved an indictment for transporting a single illegal alien. However, at the time of the defendant's arrest three illegal alien passengers from his vehicle were captured. All were interrogated and none offered any information exculpatory of the defendant. Two of the aliens were deported to Mexico and the one named in the indictment was detained. In discussing its earlier decision the court set forth the essential elements of *Mendez-Rodriguez* as distilled from a survey of its "progeny" [2] to be "(1) unilateral Government action denying a defendant access to a witness; and (2) prejudice; *i.e.*, loss of a conceivable benefit to the defendant from the missing witness's testimony." (Footnote omitted). *Id.* at 75. The court found that the defendant had demonstrated that he could conceivably benefit from the testimony of the unavailable witnesses and reversed the district court's denial of the motion to dismiss. Though the government appears to argue that in *Valenzuela-Bernal* the Ninth Circuit has retreated from its *Mendez-Rodriguez* decision by requiring a showing of prejudice,

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[2] The court discussed several of its opinions where dismissal was denied because the government had not taken unilateral action to make witnesses unavailable, the defendants had an opportunity to interview the witnesses before they became unavailable, or the missing persons were not potential witnesses to the criminal act. All of the cases were distinguished from the case then under consideration. 647 F.2d at 74-75 n. 1-3.

we do not so view the later decisions of that court. We have found no case from the Ninth Circuit where unilateral action by the government which had made an eyewitness unavailable has been held non-prejudicial.

In its only reported decision on the subject the Seventh Circuit has adopted the rule and reasoning of the Ninth. In *United States* v. *Calzada*, 579 F.2d 1358 (7th Cir.), *cert. dismissed*, 439 U.S. 920 (1978), the court made it clear that dismissal is not required in every case where a potential alien witness somehow becomes unavailable. However, upon finding that the government had acted affirmatively to make three of 13 alien witnesses unavailable, the court in *Calzada* concluded that dismissal was required. The court also held that the defendant was not required to show prejudice, since such a requirement would "emasculate the defendants' right to compulsory process" in cases of this kind.

> Since no defendant could ever be able to show with any degree of assuredness what a witness whom he has never interviewed might say on his behalf, a demonstration of prejudice will be impossible.

Id. at 1362.

While agreeing with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated when an alien is deported [8] before the defend-

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[8] We agree with the Ninth Circuit that there is no distinction between deportation of an alien witness and the government's facilitating the return of a witness to a foreign country voluntarily where its action prevents a defendant from interviewing the witness before trial. See *United States* v. *Gonzales*, 617 F.2d 1358, 1363 (9th Cir.), *cert. denied sub nom. Patel* v. *United States*, 449 U.S. 899 (1980).

ant is given an opportunity to interview the witness, the Fifth Circuit holds that dismissal is not the automatic remedy for this violation. *United States* v. *Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980). In that case the court found that the defendant had not made "the slightest suggestion" of what testimony the absent witnesses could offer that would be helpful to the defendant. *Id.* at 1269. The court agreed with the Seventh Circuit in *Calzada* that the defendant need not show prejudice with "any degree of assuredness," but required "at least a plausible theory" of how the testimony of the missing witnesses would help the defense. *Id.* at 1269-70. It could discern no such plausible theory and affirmed the district court's denial of the defendants' motion to dismiss. Dismissal was also denied in *United States* v. *Arredondo-Morales*, 624 F.2d 681 (5th Cir. 1980), where defense counsel were found to have failed to take advantage of opportunities to obtain testimony of potential witnesses. The court noted, however, that even if there had been a constitutional violation (no opportunity to interview afforded before deportation), dismissal would not have been warranted because there was nothing in the record to indicate that the defendant had been prejudiced. In *United States* v. *Henao*, 652 F.2d 591 (5th Cir. 1981), the court found there had been no constitutional violations since the missing witness had merely "skipped"; the witness had not been made unavailable by unilateral government action. Nevertheless the court reviewed its earlier decisions and concluded it had "set a very low threshold for prejudice." *Id.* at 593.

III.

A.

All courts which have considered the issue agree that a constitutional violation occurs when the first "essential element" of *Mendez-Rodriguez* is found. The record in the present case makes it clear that there was a violation. The government had total control over the 14 eyewitnesses. After obtaining the information it desired from them, the INS offered them voluntary departure and paid the expenses of their return to Mexico. The witnesses were in Mexico, or in the process of entering that country, when counsel for the defendants were notified of their appointments. There was absolutely no opportunity for defendants or their counsel to learn from the witnesses what testimony they might be able to give at trial. The violation having been established we turn now to a consideration of the second "essential element"—prejudice.

B.

The government urges us to require a showing of prejudice and argues that the defendants in the present case have failed to establish prejudice because they have not made the "slightest suggestion" of what testimony of the missing witnesses might be helpful to them. Though some showing of prejudice is required, we agree that a "very low threshold" properly defines the burden of a defendant in these cases. The inescapable fact is that no one knows what a witness may have observed or heard until he or she has been interviewed.

Chief Justice John Marshall confronted the scope of the compulsory process clause while sitting as a cir-

cuit judge in the treason and misdemeanor trials of Aaron Burr.[4] Marshall stated, "[t]he right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter." *United States* v. *Burr*, 25 F.Cas. 30, 33 (No. 14,692d) (C.C.D. Va. 1807). The cases against Burr arose out of a message of President Thomas Jefferson to Congress in which Burr was charged with planning to establish a separate government west of the Alleghenies. The charge was based on the contents of some letters written by General James Wilkinson in New Orleans. After he was indicted Burr made a motion that Jefferson be subpoenaed to produce one of the Wilkinson letters which he had referred to in his message. One of the grounds upon which the government opposed the motion was that Burr had not shown precisely how he intended to use the letter. Chief Justice Marshall held that Burr was required only to show that the letter might prove useful in impeaching a probable witness at the trial. To require a greater showing "before he knows positively what the witness will say" would be unreasonable. 25 F.Cas. at 36. The Chief Justice delineated the problems of requiring a showing of prejudice in cases where a defendant has not had an opportunity to know the content of the evidence whose production he is seeking to compel: "Now, if a paper be in possession of the opposite party, what statement of its contents can be expected from the person who claims its production, he not precisely knowing its contents?" *United States* v. *Burr*, 25 F.Cas. 187, 191 (No. 14,694) (C.C.D. Va. 1807).

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[4] See Western, *The Compulsory Process Clause*, 73 Mich. L. Rev. 73, 101-108 (1974).

In one of the few cases in which the Supreme Court has dealt with the compulsory process clause, Chief Justice Warren wrote in *Washington* v. *Texas*, 388 U.S. 14, 19 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decied where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

We conclude that the district court properly determined that the defendants DeLeon and Martinez had made sufficient showing of prejudice. They articulated the issues and identified the type of evidence which they intended to develop—the existence of some facts which would negate a finding that they had knowledge that their passengers were illegal aliens who had been in the United States less than three years. We also agree with the district court that the statements of the defendants to the INS agents do not have the significance attached to them by the government; they are not conclusive of guilt. A defendant in a criminal case always has the right to disavow an out-of-court statement and attempt to convince a jury that it does not accurately reflect what was actually said. Finally, we reject completely the implied suggestion that since the government agents turned up nothing favorable to the defendants in their interviews with the 14 witnesses, it would be pointless for the defendants' attorneys to interrogate

them. Defendants are entitled to have their defense prepared and shaped by their own attorneys, not by agents of the government.

C.

The government also argues that we need not decide this case on the basis of decisions by other courts in illegal alien cases. It maintains that there are controlling principles from other types of prosecutions which should guide us. The government relies particularly upon this court's decision in *United States* v. *Barker*, 553 F.2d 1013 (6th Cir. 1977). In *Barker* the defendants subpoenaed several government employees who had been engaged in investigating the crime with which they were charged. Though the court issued the subpoenas at government expense pursuant to Rule 17(b), Fed. R. Crim. P., they were never served by the marshal, and the witnesses did not appear. This court held that the defendants were deprived of a fair trial. Though written reports of the investigations by these witnesses were available, the defendants were found to have made a showing that their live testimony was necessary to an adequate defense. The court stated the test for determining "necessity" under Rule 17(b):

> . . . the appropriate standard is whether defendants have alleged that the witnesses will testify about facts that are relevant to any issue in the case.

Id. at 1021.

It can hardly be argued that eyewitness evidence in a criminal prosecution is not "relevant to any issue in the case." Though *Barker* was decided under Rule 17(b), the court noted that Sixth Amendment rights

were involved. To the extent that constitutional rights weer considered in *Barker*, we find nothing in its holding or its discussion of the issues which is inconsistent with our holding in the present case. In *Barker* the witnesses sought to be subpoenaed had submitted written reports which set forth the results of their investigations. Even though the defendants could have relied upon these reports, the court held they were not required to do so, but were entitled to have live testimony at their trial. The instant case presents a much stronger showing of necessity. Because the government made it impossible for the defendants or their attorneys to know what testimony might be forthcoming from the missing witnesses, the showing of need for the witnesses made at the hearing was sufficient.

The government also relies on *United States* v. *Mosca*, 475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973). In that case the government had facilitated the departure of a potential witness from the United States. However, in considering motions for a new trial, following guilty verdicts, the district court ordered the witness's testimony to be taken before an American Vice-Counsul in London, England and directed the government to reimburse defendants' counsel for the expenses of attending. After reading the entire deposition, the court of appeals determined that the defendants had failed to show any prejudice from their inability to call the missing witness to testify at trial. Under these circumstances the court found that any denial of the defendants' right to compulsory process was harmless error. 475 F.2d at 1058 n.15. *Mosca* cannot be deemed authority for reversing the judgment in the present case. The most obvious distinction is that the whereabouts of the 14 Mexicans is unknown to the government and it can-

not produce them for deposition or trial. There is no way to determine what their testimony might be.

D.

Finally, the government contends that even if a constitutional violation was shown in this case, the drastic remedy of dismissing the indictment was not justified. This argument rests almost entirely upon the recent decision of the Supreme Court in *United States* v. *Morrision*, 449 U.S. 361 (1981). *Morrison* involved the violation of a different Sixth Amendment guarantee—the right to counsel. There agents of the Drug Enforcement Agency talked with a defendant out of the presence of her retained counsel and attempted to undermine the attorney-client relationship. The court of appeals held that this Sixth Amendment violation required dismissal. The Supreme Court reversed, holding that remedies for violation of Sixth Amendment rights "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 449 U.S. at 364. After reviewing a number of its earlier decisions the Court summarized its past treatment of infringements of the right to counsel as follows:

> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense.

> Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, *which can go forward with full recognition of the defendant's right to counsel and to a fair trial.*

Id. at 365 (emphasis added).

The holding in *Morrison* was:

> . . . absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.[2]
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>
> [2] There is no claim that there was continuing prejudice which, because it *could not be remedied by a new trial or suppression of evidence,* called for more drastic treatment....

Id. at 365-66 (emphasis added). We have emphasized the language in *Morrison* which we feel distinguishes it from the present case. Where any less drastic remedy than dismissal will preserve a defendant's right to a fair trial, society's interest in the administration of criminal justice requires that the less drastic remedy be employed to that end. However, when the constitutional violation is such that the criminal procedings cannot go forward without continuing the violation, dismissal is the appropriate remedy. This is such a case. The adverse impact of the government's unilateral action upon these criminal proceedings cannot be removed by any remedy short of dismissal. We believe the district court tailored relief appropriate to the continuing prejudicial effect of the violation.

IV.

We have held that the defendants in the present case crossed over the "very low threshold" for showing prejudice. Society's interest in avoiding aborted criminal prosecutions can be served by a change in the government's procedures following arrests for violation of 8 U.S.C. § 1324. The government could adopt the practice of giving immediate notice to counsel for defendants in such cases of its intent to deport or grant voluntary departure within a certain time to illegal aliens who are material witnesses. Counsel could be told of the proposed date of deportation or departure and informed that the witnesses would be available for interviews until that date. Having given notice, the government would furnish appropriate facilities for the interviews. After interviewing the witnesses counsel could then apply to the district court for detention of those aliens whose testimony is considered necessary for a defense. If the government failed to agree on necessity, the district court would hold a hearing on the record and issue appropriate orders. In this way the necessity for the witnesses could be determined on appeal as in *Barker* and *Mosca*, *supra*.

The district court's practice of notifying counsel by mail of their appointment added to the problem in the present case. Here counsel had no opportunity to talk with the eyewitnesses because they were either in Mexico or at the border when counsel were notified of their appointments. The better practice would be to notify counsel by telephone immediately after the appointments are made so they will be able to move quickly in any case where the government

intends to deport or facilitate the departure of alien witnesses. We will not hesitate to apply waiver principles where it appears that a defendant or counsel have not acted diligently to learn whether the persons scheduled for departure are actually "witnesses in his favor" whom he is entitled to obtain by compulsory process under the Sixth Amendment. However, when a defendant has been deprived by unilateral action of the government of any opportunity to learn what the testimony of a material witness would be, if available to testify, we hold that the requirement of prejudice is satisfied by a showing which identifies the relevant issues about which the missing witness might reasonably be assumed to have knowledge. A finding that a defendant could conceivably benefit from the testimony of such a witness is not foreclosed by *ex parte* statements of such witnesses to government agents where counsel for the defendant had no opportunity to cross-examine.[5]

The judgment of the district court is affirmed.

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[5] We consider the dissent's reliance on *Morrison* to be misplaced. In *Morrison* it was possible to "neutralize the taint" of the constitutional violation and then proceed with the trial. That opportunity was not presented in this case. Because the eyewitnesses had already been put beyond the reach of the defendants and their counsel by unilateral action of the government, the Sixth Amendment rights of the defendants could be preserved only by dismissal. The dissent, like the government, attributes too little importance to the role of defense counsel. As the Supreme Court said in *Dennis* v. *United States*, 384 U.S. 855, (1966), "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." (Footnote omitted).

KENNEDY, Circuit Judge, dissenting. I agree with the majority that in its efforts to deal promptly with a large number of illegal aliens, the government in this case inadvertently violated defendents' rights to compulsory process under the Sixth Amendment. I respectfully disagree with the majority's conclusion that dismissal of the indictments is the appropriate remedy on the record now before us. In *United States* v. *Morrison*, 449 U.S. 361, 365 (1981), a unanimous Supreme Court held that "absent *demonstrable prejudice*, or *substantial* threat thereof, dismissal of the indictment is plainly inappropriate" as a remedy for even a deliberate violation of constitutional rights (emphasis added.)[1] Though parts of the majority's opinion read as if a defendant must show prejudice before the indictment against him will be dismissed where the government has made potential witnesses unavailable, the language of the announced holding and the majority's treatment of the facts of this case demonstrate clearly that under the majority's analysis no meaningful showing of prejudice is required.

The majority states its holding as follows: "[W]e hold that the requirement of prejudice is satisfied by a showing which identifies the relevant issues about which the missing witness might reasonably be as-

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[1] The majority distinguishes *Morrison* on the ground that here, unlike in *Morrison*, any prejudice cannot be remedied by a sanction short of dismissing the indictment. Op. at 16, 18 n.5. Under *Morrison*, though, a finding of prejudice is a necessary prerequisite to dismissal of the indictment, or to any other remedy for that matter. 449 U.S. at 365; *id.* at n.2. As set out below, I disagree with the majority on whether prejudice was shown here. On the necessity of some showing of actual prejudice before dismissal of an indictment is warranted, *Morrison* is not distinguishable from this case.

sumed to have knowledge." Op. at 18. *Any* eyewitness to a crime can reasonably be assumed to have knowledge about the crime. The majority would not even require an allegation that the witness have knowledge favorable to the accused. Under the majority's announced holding a defendant need only show an eyewitness is unavailable because of government action in order to win dismissal of the indictment, no matter how unlikely it is that the witness could actually benefit the defendant. *Morrison* requires more than this before dismissal of the indictment is warranted.

The majority "conclude[s] that the district court properly determined that the defendants DeLeon and Martinez had made sufficient showing of prejudice" to warrant dismissal of the indictments. Op. at 13. The District Court refused to inquire whether the missing witnesses would be of help to defendants. It made no findings of fact on whether defendants were actually prejudiced in the case. Defendants did not testify at the hearing held on defendants' motion to dismiss the indictment. Nor did they file affidavits. The only claim of prejudice was a suggestion by counsel for DeLeon that, according to his client, the missing witnesses might testify that the aliens still remaining in this country showed him evidence of their lawful status here. This statement of DeLeon through his counsel was not subject to cross-examination. It was not made under oath. No protection existed against the possibility that DeLeon was lying or that there was no basis for his supposition.

Deciding without the benefit of *Morrison*, the District Court reviewed cases from the Fifth, Seventh, and Ninth Circuits that have dealt with this same issue, all of which, of course, were also decided before

Morrison.[2] On the basis of the above and the government's representation that the witnesses were in fact unavailable, the court concluded that the other circuits' standards for dismissal of the indictment were satisfied here. The unavailable aliens were eyewitnesses to the crime. *See United States* v. *Calzada*, 579 F.2d 1358 (7th Cir.), *cert. dismissed*, 439 U.S. 920 (1978). The missing witnesses "could conceivably aid" the defendants. *See United States* v. *Gonzales*, 617 F.2d 1358, 1363 (9th Cir.), *cert. denied sub nom. Patel* v. *United States*, 449 U.S. 899 (1980). Defendants made the "slightest suggestion" that the missing witnesses would aid their defense. *See United States* v. *Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980).[3]

It is difficult to imagine a case where it would *not* be "conceivable" that a missing eyewitness could help a defendant or where the "slightest suggestion" of such help could not be made. Because the District Court did not consider the likelihood the missing witnesses could actually benefit the defendants, its de-

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[2] I am aware of only one case decided after *Morrison* that addresses the question we have here. In *United States* v. *Valenzuela-Bernal*, 647 F.2d 72 (9th Cir. 1981), the Ninth Circuit, without even mentioning *Morrison*, followed its precedent to dismiss an indictment despite the absence of any significant showing of prejudice. The Supreme Court has granted certiorari in this case. 50 U.S.L.W. 3334 (Nov. 2, 1981).

[3] The District Court misinterpreted the Fifth Circuit's holding in *Avila-Dominguez*. The court refused to dismiss the indictment because the defendant did not make the "slightest suggestion" that an unavailable witness would help him. This is not the same as holding that dismissal would be granted where a defendant did make the slightest suggestion of a possible benefit.

cision cannot be the equivalent of a finding that the defendants were prejudiced, unless "prejudice" is defined so broadly as to be meaningless. The majority's treatment of the District Court's opinion makes it clear that automatic dismissal of the indictment is required whenever the government has made eyewitnesses unavailable.

I can think of no better way to illustrate the error in the majority's opinion than with the facts of this case. DeLeon was initially charged with thirteen counts of knowingly transporting an illegal alien and Martinez was charged with five. All counts were dismissed by the District Court. The government appeals the dismissal of only those four counts charging the defendants with knowingly transporting the four illegal aliens who are still in this country.

The only suggested defense available to the defendants is that they did not have knowledge that the four remaining aliens were here illegally. Although counsel for DeLeon claimed to have interviewed the two remaining aliens his client is charged with transporting, he did not claim that those aliens, who would best know whether they showed DeLeon any documentation, would support DeLeon's claim that they showed him documentation of their lawful presence here. In his brief on appeal DeLeon admits that these remaining aliens would not support him.

Further, both Martinez and DeLeon gave lengthy confessions admitting that none of the aliens had any papers showing their lawful presence in this country, admitting that the defendants knew the aliens they transported were here unlawfully, and detailing defendants' extensive involvement with the illegal aliens. The majority attaches ilttle significance to the confessions because they are not conclusive of

guilt and defendants have the right to try to convince the jury of their unreliability. This is true but is not dispositive on the issue of prejudice. Unless some challenge is made to the confessions they at least demonstrate how unlikely it is that any of the unavailable witnesses would testify that the aliens still here did show the defendants documentation of their lawful presence. This is especially true if the remaining aliens will not themselves corroborate the defense. The confessions could appropriately be challenged at a hearing on prejudice, but no such hearing was held.

Martinez's case is particularly striking. Although counsel for DeLeon suggested how his client might be harmed by the removal of the witnesses, no significant claim has been made that the missing witnesses would be of any use to Martinez.[4] Martinez was convicted of smuggling illegal aliens once before, in 1978. Apparently among the aliens Martinez was convicted of smuggling at that time was one Tiburcio Hernandez-Alvarez. In this case Martinez is charged with knowingly transporting this same Hernandez-Alvarez and Hernandez-Alvarez is one of the illegal aliens still in this country. I am unable to see how, in any meaningful sense, Martinez could be "prejudiced" in his defense against the charge of knowingly transporting Hernandez-Alvarez by the lack of other witnesses. No matter what those other witnesses could state as to what Martinez was told to support Hernandez-Alvarez's legal status in this country, because of Martinez's prior involvement with him Mar-

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[4] The one statement made on behalf of Martinez was made by his attorney who only said that he would like to talk to the now unavailable illegal alien who arranged to bring the other aliens to Michigan. Counsel did not explain how this talk would be of any benefit at all to his client's defense.

tinez must almost certainly be found to have known that Hernandez-Alvarez was here illegally. However, under the majority's standard, the indictment against Martinez for transporting Hernandez-Martinez must be dismissed, because the government's act in making eyewitnesses unavailable has so "prejudiced" him that he cannot get a fair trial. I cannot accept this result as an exercise of common sense or as good law under *Morrison*.

The majority asserts without explanation that no remedy short of dismissal would cure the prejudice caused by unavailable witnesses. In *Morrison*, *supra*, 449 U.S. at 364, the Supreme Court stated:

> Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

An instruction to the jury that the testimony of the absent witnesses would be unfavorable to the government would probably remedy some degrees of prejudice.

I would remand this case to the District Court for a hearing on whether either defendant has demonstrated prejudice or substantial threat thereof by the departure of the aliens. Defendants should be required to make some threshold showing that the departed aliens could provide evidence material to their defense. The court could then require the government to show by a preponderance of the evidence that defendants were not prejudiced under the totality of the circumstances. If specific prejudice is identified the District Court should consider whether a sanction

less severe than dismissal of the indictments can provide the necessary cure.

I fully endorse the majority's admonition to the District Court to act more promptly where defendants are in custody in notifying appointed counsel of their appointments.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. G 80-58 CR

UNITED STATES OF AMERICA, PLAINTIFF

vs.

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DELEON, DEFENDANTS

BEFORE:

THE HONORABLE RICHARD A. ENSLEN
U.S. District Judge

MOTION TO QUASH, DISMISS
ORDER OF THE COURT

Tuesday, October 21, 1980
Federal Building
Kalamazoo, MI 49005

PRESENT:

AGNES KEMPKER-CLOYD, ESQ.
U.S. Attorney's Office
372-2404

Representing the United States of America;

NORMAN KRAVITZ, ESQ.
200 Division Street, Grand Rapids, Mi., 49503
Representing Defendant Armijo-DeLeon,

and MICHAEL SEFTON, ESQ.
2757 Eastern S.E., Suite 200,
Grand Rapids, Mi. 49503
Representing Defendant Armijo-Martinez.

THE COURT: The issue before the Court is one that one of the lawyers—I think it is Mr. Kravitz—styles in his brief as a case of first impression for the Sixth Circuit. It appears to me that that is exactly correct, that it is a case of first impression in the Sixth Circuit. I am somewhat confused about why that is true inasmuch as a large number of migrants are in Michigan each year, particularly during the seasons in which the services of migrants can be utilized by farmers, for the most part, and for the most part in western Michigan. Nevertheless, the case does not seem to have been reported by any district court, and in Michigan it does not seem to have been reported by any district court in the Sixth Circuit. It certainly has not been reported by the Sixth Circuit itself.

The defense argues that, essentially, that the Court should adopt the rationale of the Seventh and Ninth Circuits, and, in the alternative, if the Court does not adopt the rationale of the Seventh and Ninth Circuits, the Court could adopt the rationale of the Fifth Circuit and apply the additional standard in favor of the defendants.

The government argues that the Court should adopt the standard of the Fifth Circuit, and in essence, by utilizing the existence of confessions and/or admissions of each defendant, to find that within the rationale of the Judges of the Fifth Circuit that there had been either a waiver or—as she I think correctly argues, that is a weak argument by the Fifth Circuit, and the Fifth Circuit recognizes it—or more clearly, the Court should rule that the presence of the confession-admissions moot the right to confront witnesses [illegible] won't be helpful, and that some showing

has to be made, which showing isn't made in the instant case.

The government abandons, candidly and honestly, the distinction between deportation and voluntary control removal in lieu of deportation, which was an argument made, and the rest being pretty much what their argument is about.

Of course, the Court has a second alternative. It doesn't have to follow the rationale of the Seventh or the Ninth Circuits, or for that matter the Sixth Circuit. It can try to predict the rationale of the Sixth Circuit Court of Appeals.

The defendants have both filed motions indicating that they seek alternative relief, either that the government produce the witnesses or that the indictment be quashed. The government has honestly once again shared with the Court the knowledge that it is impossible for the government to produce the witnesses. So the Court either ought to grant the defendants' relief with regard to quashing the indictment, or not to quash the indictment for the reasons argued by the government. There seems to be no other alternative that the Court has.

During the recess, I also read the case pointed out by the government which appears already on this record by the government's citation of it, and I read the copy furnished by Mrs. Kempker-Cloyd, and my law clerk read the volume itself.

The reason that I read it was not because of arguments made by the government because she outlined those for me—it simply abandons the voluntary aspect of the return—but to see if the Ninth Circuit had anything further to say, and to see what the facts in the Ninth Circuit were as recently as the summer of 1980. As anyone who has read the case

knows, the facts are with one exception not the same as the facts here.

There is one exception that is the same here. There is an issue of double jeopardy which was involved, and an issue of jury trial having been started was involved. And, there was a distinction as to what had occurred with regard to some of the illegal aliens. For example, in that case one of the aliens had been let go by the government and was at one time available in Los Angeles, and then wasn't, and then was again. One witness in that case had been treated as the witnesses in this case, which is to say, given the option to return.

In the case at hand, the first point the Court makes then is that the nine witnesses are unavailable and cannot now be produced by the government. That state of facts occurred, from the facts as are stipulated to by counsel, prior to the ability of the defense lawyers to do anything about it. In the case of one lawyer, he was appointed or word for his appointment came on the same day that the aliens appeared in Mexico. The second defense lawyer learned of the matter at a time when the alien witnesses were, it is stated, between El Paso and Mexico, where their whereabouts were unknown, but at any rate where it would have been of no practical benefit to the defendants or to their counsel.

Furthermore, the Court has, as it already has observed, seen little distinction between deportation and voluntary removal for these purposes, in lieu of being deported.

The defendants here have been charged with transporting illegal aliens in violation of subparagraph "a," subparagraph 2 of Title 18, Section 1324, which is why the Court asked the question of Mr. Kravitz.

There is no charge that the defendants had anything to do with illegal aliens being transported from Mexico or any other place in the United States, but, rather, that the defendants knowingly, knowing that the illegal alien was in the United States already in violation of law, and knowing or having reasonable grounds to believe that his last entry occurred less than three years, prior to the event charged, that any person that knowing those two things transports or moves or attempts to transport or move within the United States by means of transportation or otherwise, in furtherance of such violation of the law, is guilty of a felony punishable by five years, and by a fine not exceeding two thousand dollars.

Specifically, the defendants here are alleged to have moved some thirteen illegal aliens from—I guess there are different addresses, but addresses within the State of Michigan. I believe all were in Allegan County in the State of Michigan, to which the Court takes judicial notice is within the Western District of Michigan and the Southern Divison thereof.

I believe I am correct when I say all of them occurred in Allegan County, allegedly occurred in Allegan County. For the purposes of understanding the opinion, I am going to use the wrong names of the defendants as I have started off suggesting shouldn't be used, because as Ms. Kempker-Cloyd points out, that there would be terrible confusion in what she has to say, what the defendants have to say, or what I have to say if I use their real apellido, Armijo.

Mr. Martinez, therefore, as identified in that fashion, is charged with five counts, and Mr. DeLeon, thirteen counts. There is shown a total of eighteen counts in the indictment.

In the motions presented to the Court, separately by each defendant, both defendants claim that the government by affirmative action made certain witnesses unavailable to them. These certain witnesses which I am now told were approximately nine in number—perhaps the number is greater or smaller—were essentially given the option of leaving the country or being deported therefrom, and from the comments made by the government, they evidently received assistance inasmuch as they were all transported at the same time.

They all seemed to have ended up in El Paso. On some date, I believe they were in Detroit on the 8th of August. They were in El Paso on the 10th of August, and they were in Mexico by the 12th of August. So it sounds like the government gave certain assistance to them in terms of transportation or whatever.

As the Court has previously observed, neither defendant because of that have had any opportunity to interview any of those witnesses so treated.

Counsel argues that it doesn't make any difference whether or not three or four are still here, that the others are all important, or should be important, or could be important. The Court finds as a fact that the defendants never had the opportunity to talk to any of the witnesses, furthermore, that the defendants have no power to subpoena them for the simple reason that they reside or last known resided, or were present, in the Republic of Mexico, and that the government subpoena powers do not extend, nor do the defendants', nor does this Court's, to the Republic of Mexico.

The defendants in this case had a pretrial conference on the 16th of September, 1980, before one

of the Magistrates in response to a question that the government informed the defendants that all counts of the indictment would be "pressed." I suppose that means brought to trial.

The government according to the argument it has made this morning detained at least three witnesses and possibly four for, as I recall the argument, 43 days, and then after having certain conversations with counsel for the defendants released on bond those witnesses, three of whom are still available if I understand Ms. Kempker-Cloyd's argument. One appears to have disappeared.

If I understand the argument of defense counsel Kravitz, he has interviewed at least the three, if not the four. I am not really clear whether he interviewed the one that the government can't find or whether he didn't, but he has found them even though they have been released from the incarceration that they suffered.

Both the Ninth and Seventh Circuit have considered the problem as well as the Fifth, and I think no other circuits have discussed the problem. A look at the map would suggest certainly why the Ninth and the Seventh and the Fifth have probably considered the problem. As near as I can tell, the first consideration, and that is why I was so interested in the case cited by Ms. Kempker-Cloyd—the first shot at the issue was given in 1971, and the case found in both briefs, United States versus Mendez-Rodriguez, which I will not further cite here since it is in the brief, simply to say it is a Court of Appeals decision from the Ninth Circuit in 1971, and that for the Ninth Circuit, a landmark case, the defendant was charged with transporting aliens from Mexico to the United

States. The Court notes that is not the charge in the present case, and if anything the burden on the government might be a little higher in the case at hand because the government needs to prove two kinds of knowledge in the instant case, or at least in the second instance something very close to knowledge.

In the Ninth Circuit case that I spoke about, the government deported three of six aliens found in the single defendant's car. It detained the other three as it did here so that those three could testify at trial.

The defendant in that case asked the district court for an order to produce the witnesses by the government, or in the absence of production to quash the indictment. The same motion is made in this case. The learned district judge denied those motions, but ordered the government to furnish the defendant with their names and addresses.

I can't imagine what value furnishing the names and addresses were to the defendants if the names and addresses were addresses that were located within the territorial confines of a foreign government. If they were not, they might have been of some help. I don't know.

The defendant went to trial in that case, and there was a conviction. Then he appealed his conviction, and the conviction was reversed by the Ninth Circuit.

The Ninth Circuit recognized that the government was under absolutely no duty to search out and produce witnesses who might be favorable to the defendant in that case. However, the Ninth Circuit found that it became a denial of due process when such witnesses had been made unavailable by the conduct of the government. That is at page 5 specifically of that opinion.

The Court determined that witnesses were unavailable even though they were in Mexico, which seems to go without saying, and they were unavailable for the reasons that I have stated because they were beyond the reach of the subpoena power of the district court. The Ninth Circuit in that case found it unimportant that the defendant was unable to show that the witnesses in question would have offered "favorable testimony" for the defendant.

A sentence out of the Ninth Circuit makes that clear, quote:

Appellant couldn't know, could not know what these witnesses might say if anything.

We are in the same position as the appellant. We decline to indulge in any speculation that the interviews would or would not have been fruitful to the defense. That is Mendez-Rodriguez at page 5. In the event that the Court does not prepare a written opinion, and it may well not, then I should make the full citation. It is found at 450 Fed 2d 1, at page 5 my last quote.

Since the Ninth Circuit couldn't in making that 1971 decision point to a specific case on point, it relied on the principles of law that govern eyewitnesses as well as upon the rights set out under the Fifth and Sixth Amendments to the United States Constitution.

Lawyers are prone, and they shouldn't be, to talk about Constitutional violations and rights without knowledge of what the Constitution says. The Sixth Amendment to the United States Constitution adopted in 1791 says:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation, underscoring the next sentence, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

That issue, of course, in this case and in the Ninth Circuit, and the Seventh Circuit, and the Fifth Circuit, is the issue of the confrontation and the compulsory process.

The Fifth Amendment as is mostly known by people in our land, I guess, is that no person shall be deprived of his life or his liberty or his property without due process of law. The Ninth Circuit relied in that latter regard on two cases that were not exactly analogous. The eyewitness cases that they cited were Washington versus Texas, one cite only, 388 US 14, a 1967 case, and Gregory versus United States, 125 US Appellate Court for the District of Columbia at page 140, a 1966 case. The Court in part based its opinion or seemed to base its opinion on the fact that eyewitnesses could not be treated as the property of the government or the property of the defendant, but, rather, that the accused had the right to interview any witness either for him or against him, and the government couldn't by its action prevent that from occurring.

This view of the law has been applied to that set of facts, and has remained unchanged by the Ninth Circuit to this date, including the most recent case which I will call simply Gonzales, but specifically

which had been earlier approved by the Tsutagawa case, which is a 1974 Ninth Circuit case, and Castillio, a 1980 Ninth Circuit case, and now Gonzales, a 1980 Ninth Circuit case.

Now then the Seventh Circuit takes a position that is certainly similar to that of the Ninth, in Calzada, 579 Fed 2d 1358, a 1979 case wherein the Court found defendant charged with transporting illegal aliens.

The government had arrested 13 of the 20 illegal aliens, which according to the indictment the defendants had transported. The government let five of the aliens go. It is unclear in the Seventh Circuit, but not any longer important, whether they were deported or whether they were returned to Mexico or to the border of Mexico, consistent with the present case.

In the indictment the government named the remaining six aliens as persons transported and concealed by the defendants, but not as I read it, the ones to have been let go. The defendants moved to dismiss since the missing aliens were deemed to be material witnesses, they argue, and the allowance of these witnesses to go back to Mexico rendered impossible the compulsory process rights of the Sixth Amendment.

The District Court in that case granted the motion to dismiss, and the Seventh Circuit affirmed. The Court in making its ruling cited the importance to the defendant of being able to present a meaningful defense.

In order to do so, it is necessary, said the Seventh Circuit, to have compulsory process. Both the Ninth and the Seventh Circuit recognized certain limitations and certain exceptions to the rule as pointed out in the most recent case of Gonzales, by review.

They make it clear that the dismissal of every indictment is not required. For example, when a potential alien escapes the subpoena power of the federal court, it has been recognized that the government with the court's approval may release the juvenile illegal alien for "humane" reasons. A humane argument has been made today in this case, and not without some merit by the government.

Also, the Seventh Circuit pointed out that it has been held that the government does not have to keep potential witnesses who are not charged with a crime in custody to guarantee that they will not leave this country. For each of those exceptions, the Court refers the reader of this opinion to the Seventh Circuit opinion, which opinion cites cases that I decline in the interest of time to cite.

Finally, said the Seventh Circuit, it must be shown that the unavailable aliens might be actual witnesses to the alleged crime. In passing that, the Court notes that the Ninth Circuit test is "could conceivably" benefit from the missing witness. That is how the Ninth Circuit interprets it, the requirement of the defendant. The defendant has to show that he could conceivably benefit from a missing witness' testimony.

In the Seventh Circuit, the defendant has to show that the unavailable aliens might be actual witnesses to the alleged crime.

The Fifth Circuit comes along after the law seems to be settled in two of the ten plus circuits of this country, and the Fifth Circuit comes along and doesn't follow the lead in the Seventh and Ninth. It carves out another exception in the case of Avila-Dominguez, which can be found in 610 Fed. 2d 1266, which is a 1980 case, interestingly enough as is Gonzalez. The Fifth Circuit was faced with a situation

almost identical in circumstances to Rodriguez and Calzada. In the Fifth, the government arrested 22 illegal aliens who were being transported by the defendants. The government decided to detain eight of the 22, and the rest were in fact I believe deported. The 11 aliens who ended up being deported, therefore, left the country on or about the 2nd of May, 1978. The defendants in the Fifth Circuit had attorneys on the 24th day of April, 1978. That by the Court's reckoning is about eight days prior to the deportation. The defendants in the instant case got attorneys when they were arraigned and when bond was set.

On May 3, 1978, the defendants were mistakenly told that 19 of the aliens were still in custody when in fact only eight were in custody and were being detained. On June 16th, 1978, the defendants moved for dismissal because the government failed to provide them, that is to say, the missing aliens, for interviews. The District Court denied the motions to dismiss. The defendants as in the first Ninth Circuit case were convicted and appealed.

The Court of Appeals upheld their convictions in the Fifth Circuit, and based its affirmance on the convictions on two rationales as I read it. First, the defendants' interest in the deported aliens heightened once they were unavailable and, therefore, the case is flavord with an element of waiver. Next, the Court felt that, the Fifth Circuit as I read that, did not believe that it could found its decision on a flavor of an element of waiver and so didn't do so, and went on to say that the defendants had not acted diligently to preserve the testimony of the illegal aliens.

That is the real finding, the real teaching of the Fifth Circuit. The aliens were in custody for ten days after the defendants' arrest. I think maybe that

is closer to eight, but whatever. I didn't have the calendar, and I wasn't there. They could have sought to interview them at that time, said the Fifth Circuit, but they did not. The Court said that this was an imposed condition upon the request. The reader will recall there conditions imposed in the Ninth Circuit, and will recall there are conditions imposed in the Ninth Circuit, and there are conditions imposed in the Seventh Circuit. This condition is a different condition that the Fifth Circuit imposes—in other words, show why you have failed to interview them when they are there.

The Court made the comment that there was a burden to the government, there was an expense to the government, of detaining and housing alien witnesses, and that the defendants' delay was in essence not excusable on the facts of that case. If necessary, and maybe it was, the Court made a third finding, and that is that there was not the slightest suggestion—I think that is the exact language, and I am going to say that is the exact language—slightest suggestion that the testimony would be of help to the defendants. I can give a single quote, the quote:

"It does not damage the underlying purposes of the Fifth Amendment to require that at least in counsel's brief or argument some suggestion be made as to how the departed witnesses might advance the cause of revealing the truth," at page 1270 of the Fifth Circuit.

So now we are faced with other potential code words, "might advance the cause of revealing the truth," as opposed to "could conceivably," two more code words out of the Ninth Circuit, and the potential standard on the defendant of "might be actual witnesses to the alleged crime."

Since I as the District Judge in this District have no direct guidance from my Circuit, I might say in passing, however, that a reference was made to my Circuit in one of the briefs—I don't recall which one—and specifically, to my brother, Noel P. Fox. It is not on the point of the case at hand, but my brother Judge indicates that there is support for the general proposition that the Sixth Amendment covers the right of compulsory process. Well, of course, it does. It says so in the Sixth Amendment itself.

It becomes incumbent upon the Court, not having seen any response from this Circuit, to decide what position ought to be taken. The answer of the Court is that the Court believes the rationale of all three Circuits has some merit. I find the greatest merit in the Ninth Circuit test of could conceivably aid the defendants because it is consistent in my opinion with the Sixth Amendment, and it is difficult for a defendant to show when it never gets the chance, when he or she never gets the chance, to interview the witnesses that there could be a conceivable benefit from the missing witnesses. That is the lesser of the tests.

In the instant case, both defendants have argued that the absence of the witnesses whom the government cannot now produce could conceivably benefit the defendant, defendants, and the Court holds that they could conceivably benefit the defendants. The Court further finds that the persons who have left this jurisdiction were eyewitnesses, each and every one of them had to have been eyewitnesses to what occurred in Allegan County on the 6th of August, is what the indictment says. So the defendants would fall within the protection of the Seventh Circuit rationale.

This Court specifically adopts that rationale as well as the rationale of the Ninth Circuit, so that there would be no doubt. However, the Fifth Circuit situation, the three findings of the Fifth Circuit, the Court reviews right now for the benefit of the Western District of Michigan. I agree with the government's lawyer that at best the first element presented by the Fifth Circuit of, to use its own language, "flavored with an element of waiver," does not appear in the present case because the lawyers were appointed after the missing defendants were gone.

There could be no element of waiver from that point of view.

Could there be an element of waiver with regard to the arguments made on depositions? The Court doesn't think so because the Court thinks that is treating apples like pears. The point is that the witnesses who were not here were gone. No interest could possibly be heightened because they were gone when they first got the case. Whether they reacted reasonably and responsibly as to the witnesses who were still being held, the Court feels that it does not have to pass on and does not do so.

Moreover, I have had a representation by one of the lawyers that whatever his diligence he has preserved the presence of those illegal aliens who were not transported back to the Rio Grande River. The reader or listener will also recall that the Fifth Circuit based its decision on the fact that there was not "the slightest suggestion" that the testimony would have been of help to the defendants. Here counsel for one defendant has argued no more than and no less that he believes that those witnesses or some of them would testify that they told the defendant that they were legally in the United States. The other

defense lawyer argues that one witness in Chicago, unnamed and unknown to me, is a crucial witness. Well, that is a stronger showing than that made in the Fifth Circuit. The Court believes at least, and I so find, that there is the slightest suggestion that the testimony would have been of help to both defendants.

In the Fifth Circuit vein of argument, I address myself to the question of the alleged confession or admissions against either or both defendants. It is elementary as a matter of constitutional and criminal law that a confession cannot convict a defendant in this Court or any court of this country or any state or any territory thereof. There has to be independent evidence presented by the government.

The defendant has the ability to do whatever he wants to do, testify or not testify, attack the confession or not attack the confession, produce witnesses or not produce witnesses.

If anything, however, this Court believes, I believe that the existence and the potential admission into evidence of incriminating statements increases if possible the need for the aliens who have been transported by the government back to near Mexico—it either makes no difference at all, the existence of confessions—and one could make a strong argument that it made no difference at all, that it is completely irrelevant, or one could make an argument that it heightened the need for the missing witnesses. In any event, the Court finds as a matter of law and as a matter of fact that the confessions do not alter the resolution this Court reaches.

The Court feels constrained to make further comments, however. The government asks, understandably, understandably, how can we prevent this situa-

tion from occurring, and with great compassion on the part of this particular government lawyer who happens to be a very compassionate lawyer—how, she argues, can we keep relatively innocent people behind bars while we wait for the dalliance of defendants to make a decision as to whether or not these people are important for trial, and in this case, 43 days. There are many answers to that question. I choose to give one.

The government can, should and must give notice to the defendants and their counsel of the presence and location of the aliens involved, giving them a reasonable deadline to interview, and indicating to the defendants that if the interviews are not conducted by the defendants by that date those aliens will either be deported or will otherwise be removed from the country.

If the defendants avail themselves of the opportunity to interview, and the government obviously has the same opportunity to interview, they could then be mandated by the district court either to come to a hearing or to file a written report as happened, by the way, in one of the cases that I think is a Ninth Circuit case. Apparently, the Ninth Circuit has adopted a procedure like this, and the Court resolves whether or not then the witnesses are important. An illegal alien could have at least three things to say to the government and to the defense lawyers, probably ten. One, I know nothing at all about the case involving the defendants. Two, I know something about the case involving the defendants, and it points to their guilt. Three, I know something about the case involving the defendants, and it points to their innocence.

That leaves the defendant with the option of whether he wants to make any further motion before the Court, but it should be set by some deadline.

I am not sure where I read it. There is a reference to it in the case given to me by Mrs. Kempker-Cloyd, in the factual background section of the case, about designating through the district court witnesses as being material. But, in one of the cases that I read—and it may or may not be this case. I am going to hold the lawyers and the clients and everybody else up while I look for it—a reference to the kind of procedure that I suggested was made. It seems apparent to me that one of the Circuits, and I really can't say which one, has obviously adopted a policy similar to what I now say will meet muster, and which would solve the practical problems presented to the government by the existence of a large number or even a small number of illegal aliens, first giving notice to the defendants immediately with a time deadline, and, secondly, getting before the Court in a slightly longer time deadline any arguments made by the defendants that the government should not be permitted to release whatever witnesses it wants to release. That is relatively simple.

It complies with due process requirements of the Fifth Amendment, and it complies with the confrontation rights, and the rights to compulsory process of the Sixth Amendment. It complies with common sense. It complies with the Constitution, and must comply with the Constitution, of course.

Having so found as a question of law that the elements of the Ninth, Seventh and Fifth Circuit have all been met by both defendants, specifically

by both defendants in their argument and through briefs, defendants' motion to quash is granted. It is granted because the government has candidly and honestly indicated that it cannot produce the witnesses.

There is no point in the Court giving the government ten days to produce witnesses or twenty days to produce witnesses or whatever. An order shall be drafted to that effect that simply indicates that it is consistent with my oral opinion on this date, and I will not sign that until sometime next week depending upon when it is presented to me, to give the government an opportunity to decide what it wants to do with regard to the order that I make here.

Specifically, let me say this. I will sign such an order a week from Friday or on the 31st day of October, 1980. Each lawyer for each defendant shall prepare an order, send a copy of that order to the government, and send the original and one copy to me. If I do not hear from Ms. Kempker-Cloyd with regard to the style of the order, I will enter the order on the 31st of October. If I do hear from her as to style, I will make whatever alterations I believe are necessary to conform to my opinion without going back to the lawyer that has drafted. So that that can be accomplished, I request each lawyer to prepare the order and put it in the mail tomorrow, the 22nd of October, because there seems to be some mailing problem. I want it mailed to me the 22nd, and I want it mailed to Ms. Kempker-Cloyd the 22nd. Does everybody understand me? All right.

(Whereupon, the proceeding was concluded.)

REPORTER'S CERTIFICATE

I, Jarratt W. Martin, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

(11/5/80)

JARRATT W. MARTIN, RPR-CM
U.S. District Court Reporter
Federal Building
Kalamazoo, MI 49005

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

File No. G 80-58 CR

UNITED STATES OF AMERICA, PLAINTIFF

v

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DELEON, DEFENDANTS

ORDER GRANTING DEFENDANT'S MOTION

It appearing that the Defendant Carlos Armijo-Martinez has filed a Motion to Produce Evidence and Witnesses or to Quash Indictment, and further a Brief in support thereof, and it appearing further that the Plaintiff, the United States of America, has filed a written response thereto, together with a Brief in Support thereof, and it further appearing that said Motion was duly brought on for hearing on October 21, 1980, in said Court, and that oral arguments were heard in open Court by the parties by their respective legal counsel, and after careful consideration of the above documents and arguments, and the entire record herein, and the Court being fully advised in the premises, and having made certain findings of fact and conclusions of law on the record with regard to said Motion.

NOW, THEREFORE, IT IS ORDERED that the Defendant's Motion to Quash Indictment may be and the same is hereby GRANTED and this case is DISMISSED.

DATED: 10/31/80

/s/ Richard A. Enslen
RICHARD A. ENSLEN
District Judge

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. G80-58 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DELEON, DEFENDANTS

ORDER GRANTING DEFENDANT'S MOTION

At a session of said Court held in the Federal District Court, 410 West Michigan Avenue, Kalamazoo, Michigan, on the 31st day of October, 1980.

Present: The Honorable RICHARD A. ENSLEN, U.S. District Judge.

It appearing that the Defendant Carlos Armijo-DeLeon has filed a Motion to Produce Evidence and Witnesses or to Quash Indictment, and further a Brief in Support thereof, and it appearing further that the Plaintiff, the United States of America, has filed a written response thereto, together with a Brief in Support thereof, and it further appearing that said Motion was duly brought on for hearing on October 21, 1980 in said Court, and that oral arguments were heard in open Court by the parties by their respective legal counsel, and after careful

consideration of the above documents and arguments, and the entire record herein, and the Court being fully advised in the premises, and having made certain findings of fact and conclusions of law on the record with regard to said Motion,

NOW, THEREFORE, IT IS ORDERED that the Defendant's Motion to Quash Indictment may be and the same is hereby GRANTED and this case is DISMISSED.

/s/ Richard A. Enslen
U.S. District Judge

Examined, Countersigned & Entered by Me

_____

Deputy Clerk

ATTEST: A TRUE COPY

_____

Deputy Clerk

Certified as a True Copy
GERALD H. LIEFER
Clerk

BY /s/ Sharon Moleski

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-1798

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DELEON, DEFENDANTS-APPELLEES

Filed Feb. 5, 1982

Before: LIVELY and KENNEDY, Circuit Judges; and PECK, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Helman
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 372179 874

Opposition

1

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ALEXANDER L. STEVAS
CLERK

No. 81-2049

IN THE SUPREME COURT OF THE UNITED STATES
October term, 1981

UNITED STATES OF AMERICA,

Petitioner,

-vs-

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DE LEON,

Respondents.

_____/

ON PETITION OF CERTIORARI OF UNITED STATES
OF AMERICA TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF BY RESPONDENT CARLOS ARMIJO-DE LEON IN OPPOSITION TO PETITION

NORMAN K. KRAVITZ
Attorney for Respondent
Carlos Armijo-DeLeon
Business Address:
200 North Division Avenue
Grand Rapids, Michigan 49503

I. ISSUE PRESENTED

WHETHER THE PETITIONER, HAVING CHARGED THE RESPONDENT WITH KNOWINGLY TRANSPORTING ILLEGAL ALIENS WITHIN THE UNITED STATES, AND HAVING UNILATERALLY SELECTED FOR DEPARTURE FROM THE UNITED STATES AND BEYOND THE SUBPOENA POWER OF THE TRIAL COURT SOME OF THOSE PERSONS, SUCH PERSONS BEING EYE OR RES GESTAE WITNESSES AND IN POSSESSION OF FACTS RELEVANT TO THE CHARGE AGAINST THE DEFENDANTS, AND HAVING DONE SUCH SELECTION PRIOR TO AFFORDING ANY OPPORTUNITY TO THE RESPONDENT OR HIS ATTORNEY TO INTERVIEW OR TO SECURE THE PRESENCE FOR TRIAL OF THOSE WITNESSES, AND WHERE THE DEFENSE HAS SPECIFICALLY SHOWN THAT THESE WITNESSES COULD HAVE ASSISTED THE DEFENSE OF SAID CHARGE, HAS THEREBY DENIED TO THE RESPONDENT HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION OF WITNESSES, COMPULSORY PROCESS, AND DUE PROCESS OF LAW AFFORDED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a. The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be * * *deprived of life, liberty, or property, without due process of law * * *."

b. The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * *to be confronted with witnesses against him [and] to have compulsory process obtaining witnesses in his favor. . ."

c. The statute by which the Defendant DeLeon is charged is 8 USC 1324(a)(2), as amended. It, in part, is quoted as follows:

> "Any person. . .knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law . . .any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony."

V. STATEMENT OF CASE

The nature of this case involves an evaluation of whether or not Plaintiff-Appellant, United States of America, denied to the Defendant-Appellee Respondent Carlos Armijo-DeLeon his constitutional rights of due process of law, confrontation of witnesses, and compulsory process, accorded to him by the Fifth and Sixth Amendments to the United States Constitution. The Government, after charging the respondent with illegal transportation of 13 aliens, contrary to 8 USC 1324(a)(2), unilaterally caused, under threat of deportation, eleven of those thirteen aliens who were eyewitnesses to the offense charged, to leave the territorial limits of the United States, and therefore to be beyond the subpoena power of this Court. This dramatic action by the Petitioners was instituted without advance notice and before the Defendant had an opportunity to interview those persons and otherwise to be able to take those steps necessary to insure their appearance at the trial in this case.

The following is an account of those facts that relate specifically to these proceedings above and to the arguments made in this Brief. These facts are part of the record in this case. For purposes of this Brief reference will be made to the opinion of the Court of Appeals for the 6th Circuit and to the opinion of District Court Judge Richard A. Enslen. These opinions are to be found in Appendix A of the Petitioner's Petition for Writ of Certiorari, page 1a - 28a and Appendix B of the same Petition, pages 29a - 50a, respectively.

1. On Wednesday, August 6, 1980, Carlos Armijo-DeLeon was stopped by U. S. Government agents and arrested for illegally transporting thirteen persons who were riding with him, contrary to the Federal immigration laws, and in particular 8 USC 1324(a)(2) (A-2a).

2. On the same date, the Defendant was interrogated by the Government agents and alleged to have given confessions to the crimes charged against him. (A-3a)

3. The eighteen aliens in the Defendant's car were eye-witnesses or res gestae witnesses, being present in the car at the time the respondent was arrested and they had knowledge of the relevant and material facts concerning the charges against the Defendant. (A-13a)

4. The next day, Thursday, August 7, the Defendants were brought before a U. S. Magistrate and initially arraigned on the underlying charges. (A-3a)

5. The next day, Friday, August 8, 1980, the Petitioners affirmatively took action causing fourteen of these aliens to leave the United States in lieu of deportation. (A-4a)

6. On August 8, the Court appointed legal counsel for both Defendants and on August 11, attorney for this Respondent received notice of his appointment as attorney. (A-3a)

7. The Government's action taken two days after the Defendant's arrest and before he received an attorney, in allowing those witnesses to leave the United States, removed those witnesses from the subpoena power of the United States District Court and made them unavailable to the Defendant and his attorney to discuss their account of the events in question. (A-13a)

8. In the Defendant's Carlos Armijo-DeLeon Brief filed in support of his Motion to Produce Witnesses or Quash Indictment and at the contested hearing on said Motion, he announced the essence of his defense and the <u>particular</u> testimony that the missing witnesses would provide, indicating as follows:

a. The Defendant Carlos Armijo-Martinez did not know the aliens were here illegally.

b. The two aliens kept for trial by the Plaintiff had previously shown the Defendant immigration cards and other documents evidencing their proper presence here in the United States.

c. Some, or all, of the eleven missing alien witnesses were present when those cards were shown to the Defendant and could have seen those cards and therefore be able to offer relevant testimony on the question of the Defendant's alleged knowledge of the aliens being here illegally or not. (A-5a -6a)

10. Respondent denies the claim made by the Petitioner that he made any confession to the Government agents on August 6, 1980.

VI. SUMMARY OF ARGUMENT

A. Main Argument on Merits

The Plaintiff, having charged the Defendant with knowingly transporting illegal aliens within the United States, and having unilaterally selected for deportation from the United States and beyond the subpoena power of the trial court, some of those persons, such persons being eye or res gestae witnesses and in possession of facts relevant to the charge against the Defendant, and having done such selection prior to affording any opportunity to the Defendant or his attorney to interview or to secure the presence for trial of those witnesses, and where the defense has specifically shown that these witnesses could have assisted the defense of said charge, has thereby denied to the Defendant his constitutional rights to confrontation of witnesses, compulsory process and due process of law afforded to him by the Fifth and Sixth Amendments to the United States Constitution.

B. Petitioner's Reasons For Petitioning for Certiorari

1. Objections

(a) A careful review of the petitioner's petition for certiorari as proposed therein, appears to reflect that they are in fact not asking for certiorari but are really asking that the petition be "held" pending the disposition of case of United

States v Valenzuela - Bernal, cert. granted. No. 81-450 (Nov. 2, 1982).

It should be noted that since this Brief was prepared, Valenzuela - Bernal, was reversed by this Court on July 2, 1982, 50 Law Week 5108. The defense in the instant case does not concede that Valenzuela - Bernal is dispositive of the instant case adverse to the defense, for the reasons stated in (b) below.

The Petitioner first made its request in its Application for an Extension of Time filed in March, 1982. The Supreme Court addressed the merits of this request, and Justice O'Connor, apparently giving credence to this argument, extended the time in which the Government had to file its petition - but only until May 6, 1982.

The current Petition for Certiorari is not based upon the accepted reasons stated in Rule 12. In the guise of a Petition for Certiorari, the Government requests that the petition be "held pending disposition of Valenzuela-Bernal" (emphasis added), which is really a request for extension.

If the Government were interested in this Court truly considering the instant case, it would ask for certiorari and also ask for consolidation under Rule 43(5). It has not done so. Consequently this respondent is being asked to wait for an indefinite time before the Petitioner really asks for certiorari, if ever. The defendants are entitled to a speedy determination of this criminal case.

(b) Critical factual distinctions exist between Valenzuela - Bernal and the instant case.

1. In Valenzuela - Bernal no effort was made by the defense to indicate specifically how the missing witnesses could conceivably assist the defense. In the instant case, as indicated in paragraph 8 above of the Statement of Case, the defense specifically informed the court of how the missing witnesses were important.

2. The Petitioner in its Brief in Support of its Petition in Valenzuala - Bernal case filed in January, 1982 emphasized on page 5 that the Government, in effect, appears to stipulate, to most of what apparently the missing witnesses might have said. In the instant case the Government never made such an offer. The defense in the instant case frankly probably would have objected to such an offer, since it would have prevented the jury to observe the testimony from these critical eyewitnesses. However, to the extent that the Court may consider this an important distinction, it is mentioned here.

C. Basic statement of respondent

It is difficult to speculate to what the Government might have stated in a petition for certiorari, drawn under Rule 12, but in such absence, it will do so in the remainder of this Brief. First the respondent will contend that the decision below is correct on case law, and second that there is no split in the circuits that have considered the precise issues herein.

VII. ARGUMENT

A. The Decision below is clearly correct

1. Deprivation of Constitutional Rights

The Sixth Amendment to the United States Constitution, in part, states that an accused in a criminal case is entitled to be both confronted with the witnesses against him and also to have compulsory process to obtain witnesses in his favor.

2. Undisputed Facts

In relating the instant case to the above constitutional provisions, several undisputed pertinent facts should be noted at the outset, as follows:

First, the missing witnesses are eyewitnesses, or res gestae eyewitnesses. All fourteen of them were with the Defendant on the date he was arrested.

Second, the later unavailability of the witnesses was due to the affirmative action of the Government in causing them to leave the United States. In other words, the fact that they left was not a per chance voluntary departure of these witnesses themselves.

Third, the departure of these persons was caused on exactly the same day that the Defendant's attorney was appointed, prior to his actually receiving the appointment, and prior to any opportunity whatsoever for such counsel to interview the witnesses in order to determine what they knew and to secure their presence at trial.

Fourth, in this manner, the Government decided who should and who should not leave, which action was done without consultation with anyone other than its own people and certainly not with the Respondent or his attorney.

Fifth, the defense at this trial level specifically, both in writing and orally, informed the court as to precicely how the missing witnesses could have benefited the defense.

The Government had to know that since these witnesses were eyewitnesses, they would or could provide relevant and material testimony concerning the facts in this case, and be of conceivable assitance to the Defendant in responding to the charges against him. The Government, in taking this action, deliberately made the choice of who was to stay and who was not - who the Defendant could interview and who he could not. In doing this before the Defendant or his attorney had any chance to talk to him, it effectively denied him his rights to be confronted by his accusers, his right to compulsory process, and his right not to have his liberty taken from them without due process of law.

3. Principal Case Law

Implicit in this area of the law is the principal that eyewitnesses are neither the property of the Plaintiff nor of the Defendant, that all eyewitnesses should be made available at trial, and that all parties to the suit should have the right to interview such witnesses before trial. United States v Vole, 435 F 2d 774, 778 (7th Cir, 1970). Gregory v United States, 369 F 2d 185 (D.C. Cir, 1966).

The principal case relied on for over ten years throughout the various circuits, is that of United States v Mendez-Rodriguez, 450 F 2d 1 (9th Cir. 1971). The defendant there had been charged with transporting illegal aliens to the United States from Mexico. The Government deported three of the six aliens found in the defendant's vehicle and charged the defendant with illegally transporting the rest. The defense argued that his constitutional rights under the Fifth and Sixth Amendments were violated, and the Government responded by asserting that it was the policy of the Government not to detain all aliens, but to deport some in order to avoid the financial burden of detaining and supporting the aliens until trial.

The court in quashing the indictment and finding the constitutional violation referred first to Washington v Texas, 388 US 14, 87 S Ct 1920, 18 L ed 2d 1019 (1967), quoted with approval by the 6th Circuit in the instant case (A-15a). On page (A-15a) it said as follows:

> "'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'"

Then the Court, in Mendez-Rodriguez, supra, went on to say on page 5 that although the Government had no duty to search out witnesses for the defense, nevertheless, it could not make these witnesses unavailable as it did there by deporting them to Mexico and denying the Defendant the compulsory process accorded by the Sixth Amendment. Emphasizing the fact that these were eyewitnesses, as in the instant case, the Court quoted with approval on page 5 from Gregory v United States, supra, at page 188, a case which found a denial of due process where the State had interferred with the Defendant's access to witnesses because of certain instructions to the witnesses themselves. The Court stated as follows:

> "A criminal trial, like its civil counterpart, is a quest for truth. That quest will often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is that the direction of discovery of facts before trial and elimination of surprise at trial. A related development in criminal law is a requirement that the prosecution not frustrate the defense in the preparation of its case."

4. Ex Parte Decision by Government

Judge Enslen in the case below condemned the Government's ex parte decision to keep and who not to keep, following United States v Tsutagawa, 500 2d 420 (9th Cir, 1975). (A-8a) The Court thus found a denial of the defendant's 6th Amendment rights when the Government allowed thirty-five out of thirty-nine aliens to leave the country before the defendant had a chance to see them. On page 423 the Court said as follows:

> "Mendez-Rodriguez prevents the Government from determining who will be a helpful witness for the accused. The accused (or here, prospective accused) has the right to make that decision for himself, either by interviewing the potential alien witnesses or by waiving the right to do so."

The Court went on to say on page 423, as follows:

> "The thrust of Mendez-Rodriguez is to prevent the basic unfairness of allowing the Government to determine which witnesses would not help out either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant. [citation] The vice lies in the unfettered ability of the government to make the decision unilaterally. The Sixth Amendment guarantees a defendant the right to subpoena favorable witnesses. [citation] Here, the government placed witnesses, who may have been favorable to the appellees, outside the power of our courts to require attendance. . . A defendant has a right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved from determining whether he will subpoena and call them in his defense."

5. Governmental Action

It should be noted that the Defendant's rights are violated when the unavailability of the witnesses are on account of the Government action rather than on account of the per chance decision of the witnesses themselves to leave the country. United States v Verduzco-Macies, 463 F 2d 105, 106-107 (9th Cir, 1972). It is undisputed that the Government caused the witnesses to leave in the instant case.

6. Advance Notice

A critical factor in the dismissal of the indictment in this case and others is whether the Government has failed to provide an opportunity for the Defendant to interview the witnesses and to have the chance to secure their presence before steps are taken to escort them out of the country. (A-9a & 20a)

It should be noted that due process of law was not denied in the following cases when the Government afforded defendants reasonable lenghths of time in which to contact the witnesses and secure their presence at trial bef. e action was sought to remove them. United States v Vazquez-Ramirez, 629 F 2d

1295 (9th Cir, 1980) (about two weeks), United States v Castillo, 615 F 2d 878, 882 (9th Cir, 1980) (about six weeks), United States v Ramero, 469 F 2d 1078 (9th Cir, 1972) (about one month's time). In other words, nothing more is being asked than to provide reasonable notice and hearing before consideration is given to approving the extreme action of allowing important witnesses to be made available at trial.

The defense is compelled to ask why the Government appears not to be able to "stand" the thought of retaining the witnesses for even a day for the defense to interview them. This was admitted in oral argument before this Court in the case of United States v Valenzuela - Bernal, supra, at page 31 Law Week 4038 at 4035. The respondent's response to Justice Marshall's question as to why even one day was not all right was "because it would not serve any purpose." The real reason was stated on page 4034 the Solicitor General Representative, "It's easier on the Government's financial resources and on prison conditions to not retain illegal aliens." Justice O'Connor asked "what is the Government's main concern here" The cost of keeping the witnesses?" Phillips: "yes, sort of".

The Government must know what considerations based solely on costs must yield in face of deprivation of constitutional rights. A brief detention appears to be a rule that both safeguards the defendant's rights while also minimizing costs. The preclusion of this opportunity would allow potential abuse on the part of the Government and deny the defense minimal opportunity for a defense under the 6th Amendment.

7. Requirement of Need

One of the Government's main contentions in its appeal is that even though there may be a violation of the Defendant's constitutional rights, that unless he can show a specific

need for the missing witnesses, then the indictment ought not to be quashed.

The Defendant's primary defense to the merits of the charge here is that he did not know that the persons in his car were in the country illegally. The defendant asked the District Court in his motion and at the hearing on the motion that he wished to interview those persons present at the time of the alleged offense in order to determine if they observed the detained witnesses showing the Defendant proper documentation of their legal status in this country, as alleged by the Defendant. (It should be noted here that no objection was made nor was there an issue as to whether it should be an evidentiary hearing or not. It would appear that an evidentiary hearing would be virtually meaningless for the Defendant's statement would be assumed true for purposes of the motion.) United States v Jones, 20F Fed 2d 785 (5th Cir, 1953)

Initially, it is contended that to require the Defendant to know just what these witnesses would say when he has been prevented from talking to them, is not rational. See United States v Calzada, 579 F 2d 1358, (7th Cir, 1979), where the Government removed several eyewitness aliens prior to indictment. The Court, concluding that the defendant's right to compulsory process had been violated, said on page 1362, as follows:

> "Since the right to compulsory process is intended to protect a defendant's ability to present a defense, it would seem in the abstract to be not unreasonable to expect a showing of specific injury to that interest before a court should conclude that the right had been violated. Viewed in context, however, it is quite clear that such a requirement applied to this case would emasculate the defendant's rights to compulsory process. Since no defendant could ever be able to show with any degree of assuredness what a witness whom he has never interviewed might say on his behalf, a demonstration of prejudice will be impossible." (emphasis added)

The deliberate actions of the Government bearing on the issues here cannot be ignored. A trial is the search for truth which ought to require that all relevant evidence be made available bearing on that truth. Oftentime, this relevant evidence is going to be exclusively in the hands of the Government, and it ought to be required to act responsibly regarding that evidence that comes within its control.

Nevertheless, as required in the 9th Circuit, Defendant attempted to show that the missing witnesses "could conceivably" benefit him. United States v Orozco-Rico, 589 F 2d 433, 435 (9th Cir, 1978), United States v Gonzales, 617 F 2d 1358, 1363 (9th Cir., 1980).

The Defendant Armijo-DeLeon contends that accounts of missing witnesses that immigration cards of the detained witnesses had been shown to the Defendant, clearly stand to "conceivably" benefit him. As a matter of fact, such testimony would be crucial since otherwise the Defendant would have only himself to offer testimony. He, of course, need not take the stand. Furthermore, from a jury's point of view, testimony from colleagues of the remaining witnesses that contrast with the testimony of the detained witnesses could be, in the jury's eyes, most convincing.

8. "Confession"

The Government appears to emphasize, that the Defendants' constitutional rights may have been waived or "mooted", since they already "confessed" to the crime. (Par 4 of its Brief)

The Government assumes here, without foundation, the following facts:

1. That at trial the Defendant would admit that he said anything to the agents.
2. That what was said in the statements were true and not false.
3. That he reviewed the entire statement to see if it was accurately taken down by the agent.
4. That, if anything was said, that the statement amounted to a confession.

5. That the statements were voluntarily given.

6. That, even if voluntary, they were not scared and knew what they were saying.

The above factors involve possible disputes of fact and law - yet the Government appeared to ignore this and made the early irrevocable decision that it did

In Johnson v Zerbst, 304 US 458, 464, 304 S Ct 1019, 82 2d 1461 (1938), the Court, in considering a question of waiver of the right to counsel, applied a standard that has been frequently utilized in other situations. There it said that,

> "'courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we 'do not presume acquiescence in a case of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Can it seriously be argued that the Defendants knew they were waiving their rights to be confronted by witnesses or their right to subpoena witnesses when they talked to the Government agents and "supposedly" confessed?

Finally, and patently important, is that even if the Trial Court should ultimately conclude that the statements were voluntary, the jury must be instructed by the Court that it must not only assess for itself the voluntariness of the statement but also accord what weight it should have, if any, in the light of all the circumstances. 18 USC 4501(a) (1968), as amended. United States v Kampiles, 609 F 2d 1233, 1243, (7th Cir, 1979) cert denied, 446 US 954, 100 S Ct 2923, 64L ed 2d 812 (1980)

And what are those circumstances? First, the jury would have the opportunity to determine all the factual questions implicit in the assumptions made by the Government as indicated above. Second, the jury would or should, have the chance to weigh the testimony of all the witnesses, including persons having

intimate knowledge of the facts - such as the missing eye-witnesses.

The Government, if it had any right to assume anything, was on notice to the contrary on August 7, 1980, before it released the witnesses. The Defendant appeared to be contesting the charge, when he asked for court appointed counsel. In releasing the witnesses that day, the Government acted at its own peril.

9. Harshness in Dismissal of Indictment

The Petitioner refers in its Petition (page 7 - 8) to the case of United States v Morrison, 449 US 361 as implying that outright dismissal of the indictment is too harsh and does not "fit" the so-called "harm" perpetrated by the Government. What was made clear in the 9th Circuit in Mendez-Rodriguez, supra, the 7th Circuit in Calzada, supra, and the 5th Circuit in United States v Aviea - Dominguez 610 F 2 1266 (5th Circuit, 1980), was that since, with the witnesses being beyond the subpoena power of the Court, it was impossible for the defendants to ever have a fair trial. In our case, at the trial level, Judge Enslen predicated his decision by inquiring of the Government's attorney at the hearing if it could still produce the witnesses, and the Assistant United States Attorney said it could not. (A - 49a) It was only then that the Court took the extreme action it did. Judge Lively concluded, in the 6th Circuit opinion, "when the constitutional violations is such that the criminal proceedings cannot go forward without continuing the violation, dismissal is the appropriate remedy". (A-19a) It therefore affirmed the dismissal, by noting that in Morrison the violation of the attorney-client relationship there was not alleged to involve a continuing prejudice, where here it is final for the witnesses were sent beyond the subpoena power of this court.

10. Summary

In summary, of this part of the argument, the Defendant refers the Court to United States v Nobles, 422 US 225, 95 S Ct 2180, 45 L ed 2d 141 (1975) at page 230. There Justice Powell, in requiring the Defendant to disclose an investigator's report if he wanted that investigator to testify, capsulized the issued involved here.

> "'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.'"

It may be one thing for the Government to decide for itself that it did not need eleven of the thirteen res gestae witnesses and therefore decide not to call them in their case; however, it was quite another decision for it to make to take measures that no one else, including the Defendant, would be able to call them as well.

B. No Conflict in Decisions

In every circuit that has considered a person's Sixth Amendment rights regarding the deportation by the Government of eyewitness aliens before legal counsel has a chance to interview them under the above statute have concluded the following:

a. Sixth Amendment rights are violated.

b. The defense has a lower burden to prove prejudice.

c. The remedy is dismissal of the indictment.

Those Circuits that have considered this issue are the 9th, 7th, 5th, 6th and 1st, plus the 4th at the District Court level.

The other Circuits and Districts so holding are as follows:

United States v Valenzuela - Bernal, 647 F 2d 72 (9th Cir) cert. granted, No. 81-4306 (Nov. 2, 1981)

United States v Calzada, 579 F 2 1358 (7th Cir, 1978)

United States v Avila - Dominguez, 610 F 2d 1266 (5th Cir, 1980)

United States v Tarig, 521 F Supp 773 (D Maryland, 1981)

United States v Rose, 669 F 2d 23 (1st Cir, 1982) (No constitutional violation was found under the facts of this case, although the fundamental rule was approved. There, the Government had not interviewed the witness, had not attempted to determine the witness' value, and only deported him because he was a juvenile. Further, no attempt was made by the defense to specify the prejudice.)

Since no conflict in the circuits exists, and since as many as six circuits agree on the rule, it is argued that certiorari should not be granted.

VIII. CONCLUSION

The Respondent Carlos Armijo-DeLeon, for all the facts and law stated above, requests that this Court deny the petition for certiorari.

DATED:

Respectfully submitted

Norman K. Kravitz (P16233)
Attorney for Respondent Carlos Armijo-DeLeon
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Grand Rapids, MI 49503

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No. 81-2049 (8)

IN THE SUPREME COURT OF THE UNITED STATES
October term, 1981

UNITED STATES OF AMERICA,

Petitioner,

-vs-

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DE LEON,

Respondents.

_____/

Case No.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent Carlos Armijo-DeLeon by his attorney, Norman K. Kravitz, and moves this Honorable Court to proceed in this Court In Forma Pauperis in response to the Petition for Writ of Certiorari filed by Solicitor General, Rex Lee, for the reason that Norman K. Kravitz was court appointed legal counsel in the United States District Court for the Western District of MIchigan and the United States Court of Appeals - 6th Circuit, pursuant to the District Court Order dated August 8, 1980.

DATED: July 12, 1982.

Norman K. Kravitz

Norman K. Kravitz (P16233)
Attorney for Respondent Carlos
Armijo-DeLeon
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Opposition

2

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Room 5614

No. 81-2049

IN THE SUPREME COURT OF THE UNITED STATES
October term, 1981

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UNITED STATES OF AMERICA,

Petitioner,

vs.

CARLOS ARMIJO-MARTINEZ and
CARLOS ARMIJO-DeLEON,

Respondents.

ON PETITION OF CERTIORARI OF UNITED STATES
OF AMERICA TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF BY RESPONDENT CARLOS ARMIJO-MARTINEZ IN OPPOSITION TO PETITION

MICHAEL W. SEPTON
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JUL 30 1982
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I. ISSUE PRESENTED

WHETHER THE PETITIONER, HAVING CHARGED THE RESPONDENT WITH KNOWINGLY TRANSPORTING ILLEGAL ALIENS WITHIN THE UNITED STATES, AND HAVING UNILATERALLY SELECTED FOR DEPARTURE FROM THE UNITED STATES AND BEYOND THE SUBPOENA POWER OF THE TRIAL COURT SOME OF THOSE PERSONS, SUCH PERSONS BEING EYE OR RES GESTAE WITNESSES AND IN POSSESSION OF FACTS RELEVANT TO THE CHARGE AGAINST THE DEFENDANTS, AND HAVING DONE SUCH SELECTION PRIOR TO AFFORDING ANY OPPORTUNITY TO THE RESPONDENT OR HIS ATTORNEY TO INTERVIEW WITNESSES, AND WHERE THE DEFENSE HAS SPECIFICALLY SHOWN OR THE GOVERNMENT COULD HAVE REASONABLY INFERRED THAT THESE WITNESSES COULD HAVE ASSISTED THE DEFENSE OF SAID CHARGE, HAS THEREBY DENIED TO THE RESPONDENT HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION OF WITNESSES, COMPULSORY PROCESS, AND DUE PROCESS OF LAW AFFORDED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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IV CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a. The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be. . .deprived of life, liberty, or property, without due process of law. . ."

b. The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with witnesses against him (and) to have compulsory process obtaining witnesses in his favor. . ."

c. The statute by which the Defendant Martinez is charged is 8 USC 1324(a)(2), as amended. It, in part, is quoted as follows:

> "Any person. . .knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law. . .any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony."

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X. SUMMARY

The respondent, Carlos Armijo-Martinez, while believing factual distinctions distinguish this case from that of Valenzuela-Bernal, has examined the decision of United States v Valenzuela-Bernal, and has attempted to apply the rules set forth in that decision, and would now ask this Honorable Court to find:

1. That important factual distinctions exist between Valenzuela-Bernal and the instant case at bar.

2. That even applying the rationale and logic of the Valenzuela-Bernal decision, that the Carlos Armijo-Martinez decision in the Sixth Circuit Court of Appeals should be affirmed.

3. For the reasons the government has not based its current Petition for Certiorari on the accepted reasons as stated in Rule 12 and when it had the opportunity, did not ask for consolidation under Rule 43(5). The government's Petition for a Writ of Certiorari was actually a request for an extension of time and therefore is inadequate for the foregoing reasons.

WHEREFORE, the respondent, Carlos Armijo-Martinez, by and through his attorney, Michael W. Sefton, would respectfully ask this Honorable Court to deny the Petition for the Writ of Certiorari and thereby affirm the decision of the Sixth Circuit Court of Appeals.

Date: July 29, 1982

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